Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

EUGENE BOOKER,

Petitioner,

v.

CITY OF ST. LOUIS, a Municipal Corporation; NINA MURPHY, Chairperson of the Civil Service Commission of the City of St. Louis, in her individual and official capacities; JOHN H. CLARK, Vice-Chairperson of the Civil Service Commision of the City of St. Louis, in his individual and official capacities; KAY V. LEONARD, Member of the Civil Service Commission of the City of St. Louis, in her individual and official capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Fourth Amendment prohibit opposite sex direct monitoring and observation of public employees while providing urine samples for drug testing?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner, Eugene Booker, is a citizen of the United States residing in the Eastern District of Missouri. Booker has no corporate affiliations. Booker was the Plaintiff in the District Court and the Appellant in the Eighth Circuit Court of Appeals.

Respondents

The City of St. Louis is a municipal corporation, organized and existing under the laws of the State of Missouri. The other named respondents, John H. Clark, Stanley Newsome, Sr. and Kay V. Leonard, are individuals and agents of the City of St. Louis.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case. The Eight Circuit Court of Appeals has entered a decision on an important constitutional question and in a way that conflicts with relevant decisions of this Court.

OPINIONS BELOW

The District Court opinion is set forth in the Appendix at 10a. The Eighth Circuit opinion is reported at 309 F.3d 464 (8th Cir. 2002) and as set forth in the Appendix ("App.") at 1a.

STATEMENT OF JURISDICTION

The opinion of the Eighth Circuit was filed on November 1, 2002. The Court of Appeals entered an order denying a timely petition for rehearing by panel and rehearing en banc on January 14, 2003 (App. at 34a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

A. The Fourth and Fourteenth Amendments to the United States Constitution prohibiting unreasonable searches and seizures by state actors (App. at 38a).

B. 42 U.S.C. §1983 (App. at 40a).

STATEMENT OF THE CASE

Booker brought this action against his employer, the City of St. Louis (hereinafter "City"), and its agents (collectively "defendants") for violating his constitutional rights under the Fourth and Fourteenth Amendments by subjecting him to an unreasonable search and seizure under defendant City's mandatory drug testing program. In pertinent part, Count I alleged violations of his Fourth Amendment right to be free from unreasonable searches and seizures. Defendants moved for summary judgment on Booker's Fourth Amendment claim [Joint Appendix ("J.A.") at 50-74]. In reply to defendants' statement of uncontroverted facts, Booker offered proof that: (1) the selection process for drug testing was without reasonable suspicion for his drug usage and was not truly random; (2) the testing process was not voluntary or properly authorized; (3) the collection process was an unreasonable search because Booker was observed by a female (Ms. Curia) while he urinated; and (4) Booker was never notified of his test results by a medical review officer or given an opportunity to explain or give reasons why the test should not be considered positive [J.A. at 76-78]. On November 13, 2002, the District Court entered its judgment and memorandum granting defendants' summary judgment and dismissing Booker's Fourth Amendment claim with prejudice (App. at 9a-10a). From said judgment, Booker filed a notice of appeal to the Eighth Circuit on December 6, 2001. On November 1, 2001, a three judge panel of the Eighth Circuit affirmed the judgment to the District Court dismissing with prejudice his Fourth Amendment search and seizure claim. In pertinent part, the Eighth Circuit found, "even assuming, as Booker alleges, that Curia stood a foot behind him as he provided the sample in a bathroom stall located in the restroom of a locker room in the correctional facility, we

do not believe the manner of collection was so intrusive as to constitute an unreasonable search." 309 F.3d at 467 (App. at 6a-7a). Further, the Court held "[n]or do we believe that the Constitution requires same sex monitoring." *Id.* at 468 (App. at 7a). Booker filed a timely petition for panel rehearing or, in the alternative, hearing en banc. On January 14, 2003, the Eighth Circuit denied his motions (App. at 34a).

REASONS FOR GRANTING THE PETITION

I. The Decision of the Eighth Circuit is Incorrect and Conflicts with the Supreme Court's Analysis and Standards Established in *Vernonia School Dist. 47 J v. Acton*, 515 U.S. 646 (1995).

In the past, the Eighth Circuit has recognized that the intrusiveness of the search must be considered when determining its reasonableness. *McDonell v. Hunter*, 809 F.2d, 1302, 1309 (8th Cir. 1987) (holding that a strip search prior to collecting urine was not permissible if less intrusive means could be taken to ensure the validity of the specimen). Consideration of the actual circumstances under which the search is conducted is also consistent with the policy of protecting the individual's recognized interest in urinating in private. *Rushton v. Nebraska Public Power District*, 844 F.2d 562, 566 (8th Cir. 1988).

When judging the constitutionality of governmental drug testing, the Supreme Court, in *Vernonia School Dist. 47 J v. Acton*, 515 U.S. 646 (1995), considered three factors: (1) the nature of the privacy interest upon which the search intrudes; *Id.* at 654 (2) the character of the intrusion that is complained of; *Id.* at 658 and (3) "the

nature and the immediacy of the government's concern at issue and the efficacy of the means employed for meeting" the concern. *Id.* at 660. Booker challenged the collection process, which entailed a female visually observing his genitalia as he provided his urine sample. The Eighth Circuit erred in failing to properly analyze his claim under the three factors set forth in *Vernonia*.

1. The Nature of Booker's Privacy Interest.

Booker's expectation of privacy must be legitimate as measured by objective standards. "The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate'". *Vernonia*, 515 U.S. at 654, quoting, *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985).

The Eighth Circuit's decision overlooked Booker's subjectively and objectively reasonable expectation of being allowed to urinate in private during the collection process. The collection process for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy." *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 626 (1989). The passing of urine is "a function traditionally performed without public observation; indeed, its performance in pubic is generally prohibited by law as well as social custom." *Id.* at 617 (quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).

Additionally, the City's Drug and Alcohol Testing Policy ("Regulation #120") severely restricts the observation and monitoring of City employees when required to submit to drug testing. Regulation #120 states: "[e]mployees will not be observed when providing urine samples unless there is evidence detected at the collection

site that the employee has attempted to alter the sample or has previously been observed for attempting to interfere with the testing process. Under such circumstances, only testing personnel will be allowed to observe" [J.A. at 130].[1] The regulation also states that the City "follows the prevailing guidelines and regulations established by the United States Department of Transportation and Health & Human Services, including drug tests for cutoff levels, testing procedures and protocols." *Id.* An employer conducting DOT drug testing is required to have written collection procedures and training which "clearly emphasize that the collection site person is responsible for maintaining the integrity of the specimen collection and transfer process and carefully ensuring the modesty and privacy of the donor, and is to avoid any conduct or remarks that might be construed as accusatorial or otherwise offensive or inappropriate" (emphases added). 49 CFR 40.23(d)(1), revised as of 10/1/99 (App. at 35a). "In any case where a collection is monitored by a non-medical personnel or is directly observed, the collection site person shall be of the same gender as the donor. A collection is monitored for this purpose if the enclosure provides less than complete privacy for the donor (e.g., if a restroom stall is used and the collection site person remains in the restroom or if the collection site person is expected to listen for use of unsecured sources of water)" (emphasis added). 49 CFR 40.23(d)(4) (App. at 35a). If a public restroom is used as a collection site, "the facility must be posted against access during the entire collection

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[1]The Eighth Circuit misinterpreted Booker's argument. Booker never argued that a violation of Regulation #120 was unconstitutional *per se.* see, 309 F.3d at 467 (App. at 6a). Rather, Booker argued that the regulation is evidence of his privacy expectation and the City's admitted lack of a compelling interest in monitoring all drug collection procedures.

procedure to avoid embarrassment to the employee or distraction of the collection site person." 49 CFR 40.25(b)(2) (App. at 36a). Here, the summary judgment record is devoid of any evidence that might justify the observation or monitoring of Booker's collection, let alone by a person of the opposite sex.

2. The Character of the Search.

The second factor which courts must consider is the character of the government's search and the extent to which it intrudes on the employee's privacy. The Supreme Court has held that the degree of intrusion "depends upon the manner in which production of the urine sample is monitored." *Vernonia*, 515 U.S. at 658. "Although the reasonableness of a search is a legal question, the particular *character* of [the] search is a factual matter. *Cf. O'Connor v. Ortega*, 480 U.S. 709, 726-729, 107 S. Ct. 1492, 1502-04, 94 L. Ed.2d 714 (factual dispute regarding character of search precluded lower court's granting of summary judgment on Fourth Amendment issue)" (emphasis in original). *Wilcher v. City of Wilmington*, 139 F.3d 366, 375 (3d Cir. 1998).

The Eighth Circuit found that even if it is assumed, "as Booker alleges, that Curia [female] stood a foot behind him as he provided the sample in a bathroom stall located in the restroom of a locker room in the correction facility, we do not believe that the manner of collection was so intrusive as to constitute an unreasonable search." 309 F.3d at 467 (App. at 7a). In support of its conclusion, the Court cited *Vernonia*, 515 U.S. at 657. The Supreme Court described the *Vernonia* collection procedure as follows: "[t]he student to be tested completes a specimen control form which bears an assigned number . . . The student then enters an empty locker room accompanied by an

adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed." *Vernonia*, 515 U.S. at 650. This Court found those conditions to be nearly identical to the kind of conditions typically experienced in public restrooms. The Supreme Court concluded that this method of collection was not unreasonable under the Fourth Amendment and "the privacy interests compromised by the process of obtaining the urine sample" were "negligible." *Id.* at 658.

The facts presented in this case are readily distinguishable than those presented in *Vernonia*. Specifically here, the monitor was of the opposite sex and stood close enough to Booker (a foot away) so that she could observe his genitals as he provided his urine sample. This is certainly not the kind of conditions typically encountered by males in public restrooms.

The collection process unreasonably subjected Booker to embarrassment and a high degree of bodily intrusion. The summary judgment record would permit a reasonable trier of fact to conclude that Curia failed to carefully insure the modesty and privacy of Booker. During the collection process, other employees wandered in and out of the public locker room [J.A. at 100]. Curia failed to secure the collection facility against access during the collection procedure to avoid embarrassment to Booker or distraction of herself. By monitoring Booker, Curia suggested to others that he had previously tampered with his specimen and engaged in other wrongdoing.

Finally, Curia's surveillance during the urine collection process necessarily exposed parts of Booker's anatomy to her in a manner akin to a strip search conducted without reasonable suspicion. See *McDonell*, 809 F.2d at 1308. Under such circumstances, Booker's privacy interests were unreasonably compromised by a highly offensive and unjustified process. *National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 975-76 (D.C. Cir. 1990) (holding that guidelines requiring same sex visual observation of all employees ordered to undergo reasonable suspicion urinalysis violated the Fourth Amendment).

The Eighth Circuit also relied on *Wilcher v. City of Wilmington*, 139 F.3d 366 (3d Cir. 1998) for the proposition that the "search was reasonable where monitors stood behind firefighters as they gave urine samples." 309 F.2d at 468 (App. at 7a). Unlike the facts presented here, the testing program required same sex monitoring of the urine collection process. Additionally, in *Wilcher*, the district court concluded that the drug testing procedure involved only the monitors' general observation of the urine collection process and not the observation of the firefighters' genitalia. *Wilcher v. City of Wilmington*, 891 F. Supp. 993, 996-97 (D. Del. 1995). On appeal, the Third Circuit affirmed the trial court, but noted that its "conclusion might differ had the district court accepted the firefighters' testimony that [the] monitors looked over firefighters' shoulders as they provided their urine specimens. . ." 139 F.3d at 376 n.6. Viewing the summary judgment record in a light most favorable to Booker presumably the *Wilcher* court would have found that the collection process used in this case was unreasonable under the Fourth Amendment.

3. The City's Interest.

The third and final consideration of the "reasonableness" test under the Fourth Amendment is whether the City's interest is compelling. In their brief, and at oral argument, defendants offered no justification for having a female observe Booker while he provided his urine sample. To the contrary, there is no evidence in the summary judgment record that Booker attempted to alter his sample or had been previously observed for attempting to interfere with the testing process. *Cf. Wilcher*, 139 F.3d at 377, where the Third Circuit affirmed the district court's findings that defendants' expert testimony was persuasive and that the City of Wilmington had a compelling interest in visually observing the collection process to prevent cheating.

II. The Question Presented is of Exceptional Importance in that for the First Time a Federal Court of Appeals Unconditionally Permits Under the Fourth Amendment Opposite Sex Direct Monitoring and Observation of Government Employees While Providing Urine Samples for Drug Testing.

This is the first Federal Court of Appeals decision to hold that the Fourth Amendment does not prohibit opposite sex observation during the drug collection process. In reaching its conclusion, the Eighth Circuit relied on the holdings in *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990), *cert. denied*, 501 U.S. 1209 (1991) and *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988). Both cases dealt with the claimed privacy rights of prison inmates to be free from observation throughout the day by guards of the opposite sex while disrobed. To liken

Booker's privacy interest as a correctional officer to that of a prisoner requires a leap of logic which is not supported by the summary judgment record in this case.

In *Timm v. Gunter*, male inmates alleged that prison administrators violated their right to privacy by allowing female guards to view them nude or partially nude while sleeping, dressing, showering or in the bathroom. 917 F.2d at 1096. The female guards intervened in the action asserting equal employment opportunity claims. *Id.* In analyzing whether the prison policies were constitutionally reasonable, the court applied the four-factor test announced by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). The *Timm* court summarized the factors as follows:

> First, there must be a sufficient connection between the regulation and the governmental interest used to justify the regulation. Second, the availability of alternative means of exercising the right at issue must be considered. Third, consideration is required of the impact that accommodating the asserted right would have on guards, other inmates, and prison resources. Fourth, the availability of ready alternatives to the regulation should be considered. The Court stressed that this last factor is not a "'least restrictive alternative' test," but rather a *de minimis* test: if there is an alternative available at only a *de minimis* cost to prison objectives, that is evidence of an unreasonable regulation (citations omitted).

Id. at 1099.

In *Timm*, the trial testimony established that female guards were assigned to monitor the day-to-day activities of male inmates. The surveillance techniques did not involve constant or intrusive observation of the inmates. *Id.* at 1101. For example, inmates using the urinal in the yard were monitored from a guard tower thirty feet above the urinal. *Id.* at 1101-1102. In some areas of the prison, inmates were monitored while showering by guards occasionally viewing them through two small steam and water covered windows or through two sets of bars thirty feet away. *Id.* at 1101. Applying the *Turner* analysis, the Eighth Circuit concluded first, that there was a rational connection between the policy of permitting females to visually survey inmates and the goal of prison security. Second, that there were alternative means available to inmates to retain their privacy (e.g., "[t]he use of a covering towel while using the toilet or while dressing and body positioning while showering or using a urinal allowed more modest inmates to minimize invasions of their privacy"). *Id.* at 1102. Third, accommodating the inmates' privacy rights would "adversely affect the guards and prison resources to a significant degree by requiring many staffing adjustments (which have a particularly adverse effect on female guards) and not insubstantial expenditures." *Id.* Finally, the "adjustments have more than a *de minimis* cost to prison objectives, by increasing costs and jeopardizing internal security." *Id.* Accordingly, the court concluded that the intrusion on the inmates' privacy was "outweighed by institutional concerns for safety and equal employment opportunities" for female guards. *Id.*

In *Michenfelder v. Sumner*, a male prisoner alleged that routine strip searches were unconstitutional because female correctional officers and visitors could observe

their occurrence. 860 F.2d at 330. He also contested the prison practice of sometimes assigning female officers for shower duty. *Id.* Following a trial, the magistrate found "that using female correctional officers for tasks that offer occasional views of nude prisoners [was] a good faith attempt to comply with the officers' equal employment opportunities." *Id.* Further, the magistrate found that observation of the searches by viewing video monitors "provide[d], at most, an indistinct, limited view should female officers, contrary to prison policy, closely watch the searches rather than simply monitor all the screens for unusual activity." *Id.* at 334. The magistrate also found that the opaque screens covering the windows of the control bubble prevented visitors and attorneys from discerning anything other than 'some movement' on the [video monitor] screens." *Id.* Based on the trial court's findings, the Third Circuit held that the institution's impingement on the inmate's right to privacy by employing females was "reasonably related to legitimate penological interests." *Id.* 334, quoting *Turner v. Safley*, 482 U.S. at 87.

To the extent that the Eighth Circuit relied upon cases involving prisoners convicted of crimes, it must be initially noted that the rights of these prisoners are substantially different than those of Booker who was selected for drug testing without any basis to believe that he was using drugs. The deference courts have give to "'prison administrators' under the rubric of 'legitimate penological interest' necessarily restrains the constitutional rights of convicted prisoners." *Hill v. McKinley*, 311 F.3d 899, 908 (8th Cir. 2002)(Hansen, C.J., dissenting). Unlike a convicted prisoner, Booker, as a public employee, retained his Fourth Amendment right to privacy, subject to such reasonable constraints imposed in the interest of safety or security. See *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *National Treasury*

Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990).

Additionally, the factors for determining the constitutionality of a governmental drug test, as applied in *Vernonia* are materially different than the Supreme Court's analysis in *Turner*. Moreover, even if the *Turner* analysis were to be applied here, it does not support the Eighth Circuit's judgment. First, there is no evidence in the record establishing the City's interest in directly monitoring Booker as he urinated. Second, there was no alternative means available for Booker to protect his right to privacy since the very purpose in standing a foot away from him was to continuously observe him as he urinated. Third, accommodating Booker's right to be free from opposite sex monitoring and observation during the collection process would not greatly burden the City's resources. There is no evidence in the record that it would cost the City more to employ persons of the same sex to collect urine samples from Booker or other correctional officers. Likewise, there simply is no likelihood that the City would be exposed to claims of equal employment opportunity violations since the City contracts for such services and has a legitimate business reason to require same sex monitoring during the collection process, if permitted under its written drug policy.

The record does not specify how long the collection process lasted. Yet, the record is clear that Booker was embarrassed by Curia's surveillance in the presence of his co-workers [J.A. at 87]. The Eighth Circuit, however, noted "that Curia, as an employee of an independent company, would not encounter Booker on a regular basis and if she were able to see Booker's genitals as he provided the sample, any such observations would have been fleeting." 309 F.3d at 498 (App. at 7a). The Court

analogizes these facts to those presented in *Michenfelder* where female officers were assigned tasks where they infrequently and casually, or from a distance, observed nude male prisoners. In comparison, here, Curia continuously and directly observed Booker from a foot away as he stood over the toilet and voided his urine. Under these circumstances, it is immaterial that Booker was subjected to a degrading search on only one occasion and for only the length of time it took him to produce his specimen.

Finally, the Eighth Circuit noted that "Booker did not object or ask for a male monitor." 309 F.3d at 498 (App. at 8a). There is, however, no evidence in the record as to whether or not Booker protested Curia's presence or requested a male monitor. Though not entirely clear, the Court appears to suggest that by his silence, Booker consented to the search by a female collector. The Eighth Circuit, in *McDonell v. Hunter*, stated, "[c]onsent must be given voluntarily and without coercion determined from the totality of the circumstances." 809 F.2d 1302, 1310 (8th Cir. 1987), citing *Schneckloth v. Bustamounte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48, 36 L. Ed.2d 854 (1973); see also, *Florida v. Bostick*, 501 U.S. 429, 438, 111 S.Ct. 2382, 2388, 115 L.Ed.2d 389 (1991) ("'Consent' that is the product of official intimidation or harassment is not consent at all"). Specifically, if an employee "consents" to taking a drug test, with the threat of termination if refused, a question of fact is presented on the issue of voluntariness, which the jury must decide. *Ford v. Dowd*, 931 F.2d 1286, 1294 (8th Cir. 1991).

Here, there exists at least a genuine issue of material fact as to whether Booker voluntarily consented to the collection process. By affidavit, Booker testified that under threat of termination, he authorized Barnes

Care (not Curia or her employer) to collect his urine to determine the presence and level of certain controlled substances and alcohol [Booker Aff'd ¶8; J.A. at 87]. Booker's fear was supported by Regulation #120 which provides, "[e]mployees who refuse to submit to drug and/or alcohol tests, or who fail to report to the testing facility for required test[s], must be dismissed" [Regulation #120, XIII, ¶4 at J.A. 131]. Viewed in a light most favorable to Booker, a reasonable trier of fact could find that he did not freely consent to Curia's observation of him as he urinated.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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No. 02-1114

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Eugene Booker,
Plaintiff - Appellant,

vs.

City of St. Louis, a Municipal Corporation; Nina Murphy, Chairperson of the Civil Service Commission of the City of St. Louis, in her individual and official capacities; John H. Clark, Vice-Chairperson of the Civil Service Commission of the City of St. Louis, in his individual and official capacities; Kay V. Leonard, Member of the Civil Service Commission of the City of St. Louis, in her individual and official capacities,
Defendants - Appellees.

September 13, 2002, Submitted

November 1, 2002, Filed

COUNSEL:
For Eugene Booker, Plaintiff - Appellant: Charles W. Bobinette, UTHOFF & GRAEBER, BOBINETTE & BLANKE, St. Louis, MO.

For CITY OF ST. LOUIS, NINA MURPHY, JOHN H. CLARK, KAY V. LEONARD, Defendants - Appellees: Nancy R. Kistler, Asst. City Counselor, OFFICE OF CITY COUNSELOR, St. Louis, MO.

JUDGES:

Before McMILLIAN, and MORRIS S. ARNOLD, Circuit Judges, and BOGUE,[1] District Judge.

OPINION BY:
BOGUE

OPINION:

BOGUE, District Judge.

Eugene Booker appeals from a final judgment entered in the district court[2] in favor of the City of St. Louis and members of its Civil Service Commission. We affirm as modified.

BACKGROUND

Booker was a correctional officer at the City's Medium Security Institution (MSI). A municipal regulation provided that a public safety employee, such as Booker, was subject to random drug testing and, if he or she tested positive, to dismissal. The City contracted with BJC Health Services (BJC) to assist in the drug testing program, including the random selection process. By written notice, Booker was advised that he had been randomly selected to be drug tested on July 15, 2000. On that date, Maria Curia, an employee of BJC's sub-contractor, accompanied Booker into a restroom, which was located in a locker room of the correctional facility. Booker provided the specimen in a bathroom stall, while Curia stood to his back at least a foot away. During this time, people came in and out of the locker room. On July 20, 2000, Dr. A. Patel, a medical review officer with BJC, notified the City that Booker had tested positive for marijuana. The City then advised Booker he was subject to dismissal because of the positive drug test. After a pre-termination hearing, the

City dismissed Booker. He appealed the dismissal to the Civil Service Commission, which upheld the dismissal.

Booker then filed an action under *42 U.S.C. § 1983* against the City and members of the Civil Service Commission (collectively the City). Booker alleged a Fourth Amendment violation because he had been "selected and forced to submit to drug testing, without good cause " and had not authorized Curia to collect the sample or Dr. Patel to report the results to the City. Booker also alleged substantive and procedural due process claims.

The City moved to dismiss the due process claims, asserting that Booker had failed to state a substantive due process claim, *see* Fed. R. Civ.P. 12(b)(6), and had failed to [e]xhaust his state remedies as to the procedural due process claim, see Fed. R. Civ. P. 12(b)(1). The City also moved for summary judgment on the Fourth Amendment claim, asserting that the undisputed facts showed that the random drug testing was a reasonable search given the City's interest in institutional security and Booker's diminished expectation of privacy, citing *Ford v. Dowd*, 931 F.2d 1286, 1289 (8th Cir. 1991) (Ford) and *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987) (McDonell). *See also Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989) (upholding drug testing urinalysis of Customs Service employees); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989) (upholding drug testing urinalysis of railroad employees). The City also asserted that Booker's allegations concerning the manner of collection were without factual and legal merit. Among other things, the City attached to its motion a form Booker had signed authorizing the BJC subcontractor to collect and test his urine sample for drugs.

Booker opposed the motion, asserting that the City had failed to demonstrate that his selection was random. In support, Booker submitted his affidavit, in which he stated he did not "believe" that his selection was random because no other MSI employee had been selected for testing on July 15, 2000, and many MSI employees had never been tested. Booker also asserted that Curia had violate[d] his privacy rights because she had observed him while he provided the sample. In support, Booker submitted a portion of Curia's testimony at the Civil Service Commission hearing. At the hearing, Curia testified that the bathroom where Booker provided the sample was part of a locker room at the correctional facility and that while he was providing the sample people were coming in and out of the locker room. She further testified that Booker had privacy in providing the specimen because he was in a stall and she was two to three feet away. In his affidavit, Booker claimed that Curia stood at his shoulder and "was close enough (approximately a foot away) so that she could observe [his] genitals," which embarrassed him. The City responded that Booker had not raised a claim regarding randomness in his complaint, but submitted the Civil Service Commission hearing testimony of the administrator of its drug and alcohol program. The administrator testified that BJC or its subcontractor randomly selected the employees based on a computer program used by a number of agencies for the same purpose. The City also noted that Booker had not alleged a privacy claim in his complaint and had not moved to amend his complaint.

In a combined memorandum opinion, the district court first addressed Booker's Fourth Amendment claim. Noting that an employment-related urinalysis was a search under the Fourth Amendment, to determine whether the search was reasonable, the district court balanced the City's needs against Booker's expectation

of privacy. In so doing, the district court held that the search was reasonable, rejecting his randomness and privacy claims. Turning to the due process claims, the district court granted the City's motion to dismiss the substantive due process claim for failure to state a claim. The district court held that Booker did not have a property interest, and, in any event, had not pled facts to show that his termination was irrational or arbitrary. As to the procedural due process claim, the district court acknowledged that Booker had not exhausted state remedies, but went on to hold that he had failed to state a claim. The district court then dismissed both due process claims with prejudice and dismissed the state law claim without prejudice.

DISCUSSION

We review de novo the district court's grants of the City's motion for summary judgment and motion to dismiss. *Turner v. Holbrook*, 278 F.3d 754, 756 (8th Cir.2002). In reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, "we construe the complaint liberally, taking all allegations as true, and will affirm only if it appears beyond a doubt that [the plaintiff] cannot prove any set of facts in support of the claim." *Id.* (internal quotation omitted). In reviewing the grant of summary judgment, we review the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party, and will affirm "only if there is no genuine issue of material fact, and the moving party is entitled to judgment as a mater of law." *Id.*

On appeal, Booker concedes that drug testing of correctional officers may be based on random selection. *McDonell*, 809 F.2d at 1308. He, however, argues that the district court erred in granting summary judgment because there was a disputed issue of fact concerning

whether his selection was random. The district court did not err. As the district court held, Booker's "belief" that he was singled out for testing is not evidence that he was. The City's evidence was that the selection was random. Booker's assertions that no other MSI employee had been selected for testing on July 15, 2000, or that many MSI employees have never been selected for testing do not raise a reasonable inference that he was not randomly selected.

Booker also concedes that the City has a compelling interest "in assuring that the activities of employees who come into daily contact with inmates are not [hindered] by drugs and are fully capable of performing their duties" and that, as a correctional officer in a medium security institution, he had a diminished expectation of privacy. Id. However, he asserts that he had some expectation of privacy in providing a urine sample, see *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995) (Veronia Sch. Dist.), and argues that the search was unreasonable because Curia had observed him while he provided the urine sample. The City responds that this court should not address the privacy claim because Booker failed to raise it in his complaint. Although Booker did not raise a privacy claim in his complaint, because the district court considered the claim as raised in Booker's opposition to summary judgment, we will address it.

On appeal, Booker argues that Curia violated the City's regulation concerning privacy in drug testing. Even if she did, a violation of a municipal regulation does not establish a constitutional violation for purposes of § 1983. See *Ebmeier v. Stump*, 70 F.3d 1012, 1013 (8th Cir. 1995). In addition, the City could not be held vicariously liable for a violation of its regulation. See *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir.1999).

In any event, even assuming, as Booker alleges, that Curia stood a foot behind him as he provided the sample in a bathroom stall located in the restroom of a locker room in the correctional facility, we do not believe the manner of collection was so intrusive as to constitute an unreasonable search. In *Veronia Sch. Dist.*, 515 U.S. at 657, the Supreme Court upheld a school district's random drug testing of student athletes, balancing the school district's interest in deterring drug use against the students' privacy interests. As to the privacy interests, the Court noted that male students provided the sample at a urinal along a wall, were fully clothed, and were "only observed from behind, if at all." As in Veronia Sch. Dist., "the privacy interests compromised by the process of obtaining the urine sample . . . [were] negligible." *Id.* at 657; *see also Wilcher v. City of Wilmington*, 139 F.3d 366 (3d Cir. 1998) (search was reasonable where monitors stood behind firefighters as they gave urine samples).

Nor do we believe that the Constitution requires same-sex monitoring. In a similar circumstance, this court has held that surveillance of male inmates by female guards, including observation of them in the bathroom and shower, was not unreasonable, noting that the sex-neutral practice "neither impermissibly violate[d] the inmates' privacy nor the guards' equal opportunity rights." *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990), *cert. denied*, 501 U.S. 1209, 115 L. Ed. 2d 979, 111 S. Ct. 2807 (1991). In this case, we also note that Curia, as an employee of an independent company, would not encounter Booker on a regular basis and, if she were able to see Booker's genitals as he provided the sample, any such observation would have been fleeting. See *Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988) (female guards' infrequent observation of nude male inmates did not violate the Constitution). In

addition, we note that Booker did not object or ask for a male monitor.

Booker's other arguments concerning his Fourth Amendment claim are without merit. We also need not discuss Booker's due process claims in detail. As to the substantive due process claim, even if he had a property interest, *see Moran v. Clarke*, 296 F.3d 638, 644-45 (8th Cir. 2002) (en banc) (Moran), the actions surrounding his drug testing and termination were not irrational, much less "truly irrational," *Graning v. Sherburne County*, 172 F.3d 611, 617 (8th Cir. 1999), or "conscience shocking," *Moran*, 296 F.3d at 647. As to the procedural due process claim, the parties agree that Booker has not exhausted his state remedies. As the district court recognized, "[e]xhaustion of state remedies is necessary before any federal procedural due process allegations state a claim under § 1983." *Wax'n v. Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000). Thus, "[c]onsistent with exhaustion principles, we modify the dismissal [of the procedural due process claim] to be without prejudice . . .." *Calico Trailer Mfg. Co. v. Ins. Co. of N. Am.*, 155 F.3d 976, 978 (8th Cir. 1998).

Accordingly, we modify the dismissal of the procedural due process claim to be without prejudice and affirm the judgment of the district court as modified.

Footnotes

n1 The Honorable Andrew W. Bogue, United States Senior District Judge for the District of South Dakota, sitting by designation.

n2 The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

Case No. 4:01CV00351JCH

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EUGENE BOOKER,
Plaintiff,

vs.

CITY OF ST. LOUIS, MISSOURI, et al.,
Defendants.

Filed: November 13, 2001

JUDGMENT

In accordance with the Memorandum and Order entered this day and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants Motion for Summary Judgment (Doc. 10) and Motion to Dismiss (Doc. 9) are GRANTED and that Plaintiff Eugene Booker's Complaint (Doc. 1) is DISMISSED.

Dated this 13th day of November, 2001.

Jean C. Hamilton
United States District Judge

Case No. 4:01CV00351JCH

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EUGENE BOOKER,
Plaintiff,

vs.

CITY OF ST. LOUIS, MISSOURI, et al.,
Defendants.

Filed: November 13, 2001

MEMORANDUM AND ORDER

Before the court is Defendants' Motion for Summary Judgment (Doc. 10) and Defendants' Motion to Dismiss (Doc. 9). For the reasons set forth in this Memorandum and Order, Defendants' motions are granted.

UNCONTROVERTED FACTS

Plaintiff Eugene Booker was hired as a correctional officer by Defendant City of St Louis ("the City") on May 23, 1980, and was assigned to the municipal jail. fn1 On or about July 15, 2000, the City selected Plaintiff to submit to drug testing. See Doc. 1,¶ 11. Plaintiff's "Alcohol/Drug Evaluation Notice" stated that "[c]urrent City employees testing positive for drugs will be dismissed.' Def.'s Mem., Doc. 10. Ex. A. The City's Administrative Regulation 120 provides that City "employees who test positive for drugs will" and who "refuse to submit to drug . . . tests must be dismissed." Pl.'s Reply, Doc. 10, Ex. 2 at XIII, ¶¶ 1,4; Def.'s Mem.,

Doc. 10, Ex A. Also, the City's Civil Service Rules, Rule IX, states that employees may be dismissed if they are found unable to perform the duties of their jobs or for becoming subject to disciplinary action. See Def.'s Mem., Doc. 10. Ex. F.

Plaintiff acknowledges that he authorized Barnes Care Corporate Health Services ("Barnes Care") to collect his urine, but asserts that his specimen was collected by a non-Barnes Care employee. See Pl.'s Resp., Doc. 10 at 2. Plaintiff asserts that his specimen was collected by an employee of Clinical Collection Management, Michelle R. Curia. See Pl.'s Resp., Doc. 10, Ex. 3. Defendants' Exhibit C is a laboratory report prepared by Clinical Reference Laboratory. See Def.'s Mem., Doc. 10, Ex. C. The parties agree that the Laboratory which performed the urinalysis reported the results to Barnes Care, and that the specimen, identified as Plaintiff's, tested positive for marijuana. See Def.'s Mem., Doc.10, Ex. B; Doc. 1, ¶¶ 12-14.

Plaintiff denies Defendants' contention that A.B. Patel, M.D., reviewed the test results with him and gave him a opportunity to explain why the test should not be considered positive. See Pl.'s Resp., Doc. 10. ¶ 6. Also, contrary to Defendants' contention, Plaintiff denies that the specimen was reviewed by Dr. Patel, pursuant to the City's policy. See id. Defendants' Exhibit B is a memorandum signed by Dr. Patel, stating that he "discussed the results of [the urinalysis] with [Plaintiff] in person or by telephone and gave him . . . an opportunity to explain or to give a reason why the test should not be considered positive." Def.'s Mem., Doc. 10, Ex. B.

On July 28, 2000, Plaintiff was notified of his pre-termination hearing. See Def.'s Mem., Doc. 10, Ex. D. fn2

The notice stated that, at his hearing, Plaintiff would have the opportunity to "respond to [the charges against him] and offer any explanation of circumstances that might mitigate the charges." Id. Plaintiff's pre-termination hearing took place on August 4, 2000, and Plaintiff was dismissed on August 8, 2000. Plaintiff appealed his termination to the City's Civil Service Commission ("the Commission").

On October 9, November 22, and December 5-9, 2000, a hearing officer for the Commission conducted a hearing regarding Plaintiff's termination See Tr. of Hearing, Doc. 6; Def.'s Mem., Doc. 10 Ex. F. The Commission upheld Plaintiff's termination by a decision dated February 9, 2001. See id. The Commission concluded that the City had complied with the provisions of its Regulation 120 fn3 See id. The Commission further found that the decision to terminate Plaintiff was made "for just cause," and that the decision was "reasonable and proper and was not an abuse of discretion." Id. Additionally, the Commission found that Plaintiff's testimony regarding the urinalysis was not credible. See id.

Plaintiff filed a complaint in this matter on March 9, 2001. See Doc. 1. In Count I of the complaint, Plaintiff alleges that, acting under color of state law, Defendants deprived him of his rights under the Fourth and Fourteenth Amendments, and that this conduct is actionable under 42 U.S.C. § 1983. Count I alleges that Plaintiff was subjected to an unreasonable search and seizure as a result of Defendants' conducting a urinalysis of a specimen provided by him. Count I further alleges that Plaintiff was deprived of substantive and procedural due process. In Count II, Plaintiff seeks administrative review of the Commission's affirmation of the City's termination of Plaintiff. Plaintiff asserts that the Commission's decision is reviewable by this court

pursuant to Mo. Rev. Stat. §§ 536.010, 536.100, and 536.140.

STANDARD FOR SUMMARY JUDGMENT

The Court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome will properly preclude summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (Anderson). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id.

A moving party always bears the burden of informing the Court of the basis of its motion. See Celotex, 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere existence of some alleged factual dispute." Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleading. Anderson, 477 U.S. at 256.

In passing on a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party and all justifiable inferences are to be drawn in its favor. Id. at 255. The Court's function is not to weigh the evidence, but to determine whether there is a genuine issue for trial. Id. at 249.

STANDARD FOR DISMISSAL

When ruling on a motion to dismiss under Rule 12(b), the Court must take the allegations of the complaint as true. See East v. Lemons, 768 F.2d 1000, 1001 (8th Cir. 1985). The complaint must be liberally construed in a light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Coleman v. Watt, 40 F.3d 255,258 (8th Cir. 1994). A cause of action should not be dismissed for failure to state a claim unless, from the face of the complaint, it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46, (1957); Jackson Sawmill Co., Inc. v. United States, 580 F.2d 302, 306 (8th Cir. 1978).

SUMMARY JUDGMENT DISCUSSION

Plaintiff's Fourth Amendment Claim

Defendants assert that they are entitled to summary judgment in regard to Plaintiff's claim, in Count I, that they violated his Fourth Amendment right to be free from unreasonable searches and seizures. Defendants contend that the uncontroverted facts establish that Plaintiff was not subjected to an unreasonable search and seizure by Defendants' conducting a urinalysis of the specimen which Plaintiff provided. fn4

A urinalysis required by an employer implicates the Fourth Amendment. See Nat'l Treasury Employees Union v. Von Raab, 489 US. 656, 668 (1998) (Von Raab). In particular, the United States Supreme Court has held that a urinalysis is a search and seizure under the Fourth Amendment. See id. (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1999) (Skinner)); Ford v. Dowd, 931 F.2d 1286, 1289 (8th Cr. 1991) (Ford).

The plain language of the Fourth Amendment, however, only proscribes those searches which are unreasonable. Therefore, to prevail on their motion for summary judgment, Defendants must establish, based on the uncontroverted facts, that the urinalysis, to which Plaintiff was subjected, was reasonable. See Von Raab, 489 U.S. at 655. The Eighth Circuit has held that a "[d]etermination of the reasonableness of a search depends on the context in which a search takes place, and requires a balancing of the individual's legitimate expectation of privacy and personal security against the government's need for the search." Rushton v. Nebraska Public Power Dist., 844 F.2d 562, 566 (8th Cir. 1988) (Rushton). This standard is applicable in the context of an employment related urinalysis. See id.

Governmental interest in conducting urinalysis of law enforcement employees is well established. See Von Raab, 489 U.S. at 670 (holding the public interest demands measures to prevent the promotion of drug users in the Customs Service); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (McDonell). Indeed, "[c]orrectional institutions are unique places 'fraught with serious security dangers.'" McDonell, 809 F.2d at 1305 (citations omitted). "[T]he use of drugs by employees who come in contact with inmates. . . on a regular day-to-day basis poses a real threat to the security of the prison." Id. at 1308.

In Von Raab, 489 U.S. at 665-70, the Supreme Court addressed the standard for reasonableness of a search and seizure in the context of the employment of a law enforcement officer. The Court held that "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests,

to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Id. at 665-66.

In regard to an individual's expectation of privacy, the Eighth Circuit has held that individuals "have an interest in urinating in private." Rushton, 844 F.2d at 566. The Eighth Circuit has further acknowledged that "some potentially embarrassing personal information can be obtained via urinalysis; for example, the test would reveal the presence of diabetes and pregnancy, and of antiepileptic and antidepression medication." Id. Individuals, however, working in contexts where there is potential for great harm, such as a correctional facility, already have diminished expectation of privacy. See id. Additionally, the need to protect against governmental intrusion is diminished in the context of an employment related urinalysis, where "the investigation is neither designed to enforce criminal laws nor likely to be used to bring criminal charges against the person being tested." Id. at 567.

In his reply brief, Plaintiff makes an issue of the fact that an employee of Clinical Collection Management observed him while he provided the urine specimen. Plaintiff contends that this was an unreasonable intrusion of his privacy. See Pl.'s Reply, Doc. 10 at 6. Under certain circumstances, Regulation 120 permits an employee of the testing facility to observe an employee as the employee provides a sample. See Pl.'s Reply, Doc. 10, Ex.6. Contrary to Plaintiff's assertion that he was observed, at his hearing, Michele Curia, the testing facility employee who observed Plaintiff, testified that the bathroom where Plaintiff provided a specimen was in a locker room at the correctional facility, and that the bathroom is part of the locker room. See Pl.'s Reply, Doc. 10, Ex. 3 at 51-52. Curia testified that Plaintiff

provided the specimen in a stall. See id. Curia testified that she checked the stall before Plaintiff entered it, she remained in the "restroom area" while Plaintiff provided the specimen, and was within two or three feet from Plaintiff while he provided the specimen. Id. Curia said that while Plaintiff was providing the specimen, people were coming in and out of the locker room. See id. at 52. Curia's testimony establishes that Plaintiff provided the specimen under the ordinary conditions which employees would use the restroom in the correctional facility.

Based on the unrefuted facts and the applicable substantive law, the undersigned concludes that, in the context of his employment as a corrections officer, while within the confines of the corrections facility, Plaintiff's subjective expectation of privacy was diminished. See McDonell, 809 F.2d at 1305.

The parties in the matter under consideration do not agree as to whether the City's request that Plaintiff submit to urinalysis was random or whether Plaintiff was singled out. Plaintiff asserts that he was singled out, and that he provided the sample because he was threatened with discharge. Defendants assert that the City's request was made pursuant to random selection.

The Eighth Circuit has placed a restriction on systematic random selection of employees in prison settings. The court has required that the selection of employees for testing must not be "arbitrary or discriminatory." McDonell, 809 F.2d at 1305 (citations omitted). Courts have distinguished between random drug testing and drug testing based on suspicions regarding a particular employee. fn5 See Ford, 931 F.2d at 1289.

When a urinalysis is requested by a government employer based on individualized suspicion, "'some quantum of individualized suspicion is usually a prerequisite to a constitutional search." Rushton, 844 F.2d at 567 (citing National Treasury Employees Union v. Von Raab, 816 F.2d 170, 179 (5th Cir. 1987)). The Fourth Amendment, however, "imposes no irreducible requirement of such suspicion." Id. The circumstances of each case will determine whether or not individualized suspicion is required. See id. (holding that where the state's "interest is so great and the private interest so diminished, . . . individualized suspicion is not required").

In an affidavit submitted to this court, Plaintiff states that he does "not believe that [he] was randomly selected for drug testing in that, no other employees of the City assigned to MSI were required to submit to drug testing on July 15, 2000." Pl.'s Reply, Doc. 10, Ex. 1, ¶ 6. Plaintiff further states that he also believes his testing was not random because many correctional officers "have never been required to submit to drug or alcohol testing." Id.

At Plaintiff's hearing before the Commission, the Commissioner of Corrections, Alice Pollard, testified that there were no reports made that Plaintiff was under the influence of drugs on the day be was tested. See Pl.'s Reply, Doc. 10, Ex. 2 at 144. An information sheet, completed by Curia, states that on July 15, 2000, she was to conduct "2 NON-DOT Random" drug screens on City employees, one of whom was Plaintiff. See Pl.'s Reply, Doc. 10, Ex. 4 at 2. The information sheet stated that the other employee, who was supposed to be tested on the same date as Plaintiff, was not available.

Also, at the hearing, Karen West, Human Resource

Specialist for the City, described the ordinary procedures used by the City for random testing fn6 See Def.'s Mem., Doc. 10, Ex. G. West testified that she did not know if these procedures had been used in regard to Plaintiff's providing a sample.

Plaintiff does not suggest that the City had a reason for singling him out. Rather, he generally asserts the City singled him out and that, in doing so, it acted arbitrarily and without cause. Despite Plaintiff's suggestion that no other employees were tested on the day he was tested, the document signed by Curia states that another employee was scheduled for testing, and that Plaintiff's testing was random. See Pl.'s Reply, Doc. 10, Ex. 4. In addition, Dr. Patel's notification to the City, containing the notation that he discussed Plaintiff's test results with him, states that the reason for Plaintiff's test was "[r]andom." Def.'s Mem, Doc. 10, Ex. B. Plaintiff did not present documentation to support the assertions in his affidavit that his test was not random and that many officers were never tested.

Upon responding to a motion for summary judgment, a non-moving party may not merely rest on general allegations, as does Plaintiff. See Anderson 477 U.S. at 256. Therefore, considering the testimony of Curia and the exhibits of both parties, the undersigned finds that Plaintiff's affidavit is insufficient to establish that a reasonable jury could find that Plaintiff was singled out or that Defendants acted arbitrarily or in a discriminatory manner. See Anderson, 477 U.S. at 254.

Assuming, arguendo, that Plaintiff was singled out, the undersigned considers, for purposes of summary judgment, whether Defendants acted based on a reasonable suspicion. fn7 Considering the substantive law and the uncontroverted facts, the undersigned finds

that the City's interest was so great and Plaintiff's privacy interest so diminished that individualized suspicion was not required for the City to request that Plaintiff provide a specimen. See Rushton, 844 F.2d at 567, The public interest in maintaining security in the City's correctional facility, clearly out weighted Plaintiff's expectation of privacy. See id.

Plaintiff also generally argues that he submitted to testing under threat of termination. Plaintiff does not dispute that the City's Administrative Regulation 120 provides for discharge of employees who test positive for illegal drugs. Plaintiff also does not dispute that he was informed of this at the time he was told to provide a specimen. As stated above, Regulation 120 also provides that an employee who refuses to submit to urinalysis will be terminated, and Rule IX provides that employees are subject to termination for committing acts which compromise their ability to perform their job. Also, as discussed above, security in the City's correctional facility requires that officers be drug free. Thus, the undersigned finds that the undisputed facts of this matter establish that Plaintiff did not submit a urine specimen under duress.

Because the undersigned has concluded that Defendants' conduct in requesting Plaintiff to submit to urinalysis was consistent with the needs of the correctional facility and the City's regulations, and that Plaintiff voluntarily submitted the specimen, the undersigned finds that the urinalysis to which Plaintiff was subjected was reasonable. See McDonell, 809 F.2d at 1310 (holding that a "legal search conducted pursuant to voluntary consent is not unreasonable and does not violate the fourth amendment"). Because Defendants have established that the urinalysis was a reasonable search, they must prevail on summary judgment. See

Von Raab, 489 U.S. 655.

Having considered the facts in a light most favorable to the Plaintiff, the court concludes that there are no genuine issues of fact for trial in regard to Plaintiff's Fourth Amendment claim. After considering the applicable substantive law, the court further concludes that Defendants are entitled to a summary judgment in regard to Plaintiff's Fourth Amendment claim.

Defendants further contend in their Motion for Summary Judgment that Plaintiffs Fourth Amendment claim cannot be joined in a proceeding with his petition for judicial review. The undersigned need not address this issue, as the court found above that Defendants are entitled to summary judgment on Plaintiff's Fourth Amendment claim.

MOTION TO DISMISS

Plaintiff's Due Process Claim

Defendants move to dismiss Plaintiff's claim, in Count I of his complaint, which alleges that Plaintiff's termination violated procedural and substantive due process, as guaranteed by the Fourteenth Amendment. In support of their motion, Defendants argue that this court lacks subject matter jurisdiction over Plaintiff's procedural due process claim because Plaintiff failed to exhaust his state remedies. Defendants further argue that Plaintiff has failed to state a claim for a violation of any substantive due process right.

In support of his allegation that he was denied procedural and substantive due process, Plaintiff asserts that he was selected and forced to submit to drug testing without good cause and that, under threat of

termination, he submitted to drug testing. See Doc. 1 at 4. In particular, Plaintiff asserts that he was denied substantive and procedural due process by numerous acts and omissions of Defendants. See Doc. 1, ¶ 17.

Plaintiff designates, in paragraph 17 of his complaint, numerous instances of alleged violations of substantive and procedural due process. Plaintiff does not designate which allegations involve substantive, and which allegations involve procedural, due process. Plaintiff generally asserts that the method by which he was selected for drug testing was arbitrary and capricious and that the Commission's decision to terminate him was arbitrary and capricious because the decision was "not supported by competent and substantial evidence." See Doc. 1. ¶¶ 17(A), (G). Plaintiff also contends that his due process rights were violated because he was not given adequate written notice regarding his termination, because he was denied a post-deprivation evidentiary hearing, because the Commission exceeded its authority and improperly evaluated his credibility, and because be was denied a fair hearing. See Doc. 1, ¶¶ 17(B)-(F). For purposes of this memorandum and order, the undersigned will assume that Plaintiff suggests that each instance violates his right to substantive due process.

Defendants argue that an individual does not have a substantive due process right to continued employment. fn8 Plaintiff argues that the Eighth Circuit's holdings that employees have no property interest, and hence no substantive due process rights in continued employment, are applicable only to at-will employees. The undersigned need not address this issue because, for the reasons stated below, this court finds that Plaintiff was an at-will employee.

A property interest in employment does not exist, unless

it is created by state law. See Skeets v. Johnson, 816 F.2d 1213, 1214 (8th Cir. 1987). The general rule, in Missouri, is that either party to an employment relationship may terminate that relationship at-will. See Singleton v. Cecil, 176 F.3d 419, 422 (8th Cir. 1999) (Singleton); Bowen v. Missouri Dep't of Conservation, 46 S.W.3d 1 (Mo. App. 2001). The Missouri Court of Appeals has stated that "the mere right to a careful review' [of a termination does] not change the nature of [an employee's] employment from at-will employment to an arrangement in which he [has] a property interest.'" Id. at 8-9. Moreover, a right to appeal a termination, does not change an at-will employee's status. See id.

Therefore, merely because, as a City employee, Plaintiff may have been entitled to a conference regarding the results of a urinalysis, or he may have been entitled to a post-termination hearing by the Commission or to other procedures, Plaintiff did not have a property interest in his employment. See Johnson v. City of West Memphis, 113 F.3d 842, 844 (8th Cir. 1997). The undersigned finds that none of the facts alleged by Plaintiff in paragraph 17 (A) - (G) of his complaint, establish that he was other than an at-will employee. Because Plaintiff has pleaded no facts to suggest that he is other than an at-will employee, the undersigned finds that Plaintiff was an at-will employee pursuant to Missouri law. See Rogerson v. Hot Springs Adver. and Promotion Comm'n, 237 E3d 929, 930 (8th Cir. 2001); Yowell Combs, 89 F.3d 542, 544-45 (8th Cir. 1996).

Assuming arguendo, however, that Plaintiff had a substantive due process right to his employment, the Eighth Circuit has suggested that, to violate any right to due process, a discharge must be more than arbitrary or capricious. See Graining v. Sherburne County, 172 F.2d 611, 617 (8th Cit 1999) (Graining); Moore v. Warwick

Publ. Sch. Dist. No. 29, 794 F.2d 322, 329 (8th Cir. 1986). It must be "'truly irrational.'" Id. Because the specimen, identified as Plaintiff's, tested positive for illegal drugs, Plaintiff has not shown that the City's termination of him was truly irrational. See id. Moreover, the Eighth Circuit has stated that "[m]erely labeling a governmental action as arbitrary and capricious, in the absence of the deprivation of life, liberty, or property, will not support a substantive due process claim." Singleton, 176 F.3d at 424 (citations omitted).

A decision to discharge an employee is not arbitrary or capricious, merely because it is based on an erroneous factual finding. See Reinhart v. City of Maryland Heights, 930 F. Supp. 410, 412-13 (ED. Mo. 1996) (Reinhart). Thus, Plaintiff was not necessarily deprived of due process even if the results of his urinalysis were incorrect. fn9 See Singleton, 176 F.3d at 428 (holding that it is not a proper function of a court to act as a "super personnel" department). Because the specimen identified as Plaintiff's tested positive for marijuana, the undersigned finds that Plaintiff has failed to plead facts which would establish that his termination was arbitrary, capricious, or irrational. See Young v. City of St. Charles, 244 F.3d 623, 625 (8th Cir. 2001); Reinhart, 930 F. Supp. at 410.

Plaintiff next alleges that he was denied procedural due process. In Paragraph 17 of the Complaint, Plaintiff challenges the procedures implemented by the City during the course of his discharge proceedings, including allegations that: (1) he was not "given adequate written notice of the cause or grounds for his termination;" (2) he was denied a "post-conviction evidentiary hearing;" (3) the Commission reached its conclusion without properly evaluating his credibility, and (4) he was not provided copies of various

documents. See Doc. 1, ¶ 17(B)-(F).

These alleged procedural deficiencies arguably could be properly raised under the administrative review procedures provided by the Missouri Administrative Procedure and Review Act, Mo. Rev, Stat. § 536.010 et seq. This Act provides for judicial review of administrative decisions by Missouri courts of appeal. See Mo. Rev. Stat. §§ 536.100, 536.140. fn10

Assuming that Plaintiff's procedural due process claim is properly before this court, in order to establish that he was deprived of this right, Plaintiff must establish that he was deprived of a property or a liberty interest, and that he was deprived of such an interest without due process of law. See Marler v. Missouri State Bd. of Optometry, 102 F.3d 1453, 1456 (8th Cir. 1996) (Marler). Further assuming that Plaintiff had either a property or liberty interest in his employment, for the reasons stated below, the undersigned finds that he was not denied due process of law.

"Due process requires adequate notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Id. (citing Past v. Harper 980 F.2d 491,493 (8th Cir. 1992)). Plaintiff alleges that he was not given notice of the cause for his dismissal. See Doc. 1, ¶ 15. The City's notice to Plaintiff requesting that he be tested, however, recited the City's policy of discharging employees who tested positive for drugs. See Def.'s Mem., Doc. 10, Ex. A. Although Plaintiff denies that Dr. Patel discussed the results of the urinalysis with him, he does not deny that he received the written notification of the test results, signed by Dr. Patel, prior to his termination. See id. Ex B. Although Plaintiff suggests that he was not given adequate notice of the cause or grounds for his termination, he pleads no facts to

support this allegation or to describe how he was denied an opportunity to rebut the results of the urinalysis at his pre-termination and post-termination hearings. fn11 Under such circumstances, the undersigned finds that Plaintiff has failed to plead facts alleging that he did not receive notice of the reason for his discharge.

When a pre-termination hearing provides "'an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action,'" the requirements of due process are met. Wallin v. Minnesota Dept. of Corrections, 153 F.3d 681, 690 (8th Cir. 1998) (Wallin) (citations omitted). Not only did Plaintiff have a pre-termination hearing, but also he had a post-termination hearing before the Commission, at which he had the opportunity to present evidence, call witnesses, and confront his accusers, and where he was represented by counsel. See Doc. 6, Tr. of Hearing.

Additionally, the Missouri Administrative Review Act provides additional procedures which afford Plaintiff the opportunity to be heard "at a meaningful time and in a meaningful manner," because it afforded him the opportunity for judicial review. Marler, 102 F.3d at1456 (citations omitted).

Even if Defendants' alleged failure to afford Plaintiff "adequate written notice of the cause or grounds for his termination" could be interpreted to violate his right to procedural due process, Plaintiffs subsequent participation in the proceedings of the Commission rectified this denial. The United States Supreme Court has held that "a state actor's failure to provide a person with a pre-deprivation hearing where a state actor's . . conduct caused a deprivation of a property or liberty

interest, does not deprive an individual of procedural due process where the state provides adequate post-deprivation remedies." Wallin, 153 F.3d at 1456, n.5 (citing Hudson v. Palmer, 468 U.S. 517, 533 (1984)). Thus, even if Plaintiff were deprived of due process in the City's pre-termination procedures, his post-termination hearing before the Commission provided him with an adequate remedy pursuant to the Fourteenth Amendment. See id. Therefore, Plaintiff received meaningful opportunities to be heard, both prior to, and after, his termination. Under such circumstances, the due process clause was satisfied by the procedures employed by Defendants. See id.

Plaintiff makes general allegations regarding the manner in which the Commission reached its determination. See Doc. 1, ¶¶ E. F. Plaintiff's opportunity, however, to present evidence, call witnesses, and confront his accusers at his post-termination hearing before the Commission met the requirements of due process. See Wallin, 153 F.3d at 690.

The court concludes that the pleadings do not establish that the procedures employed by Defendants, in the course of Plaintiff's termination, violated Plaintiffs right to procedural due process.

FEDERAL JURISDICTION

Fed. R. Civ. P. 18(a) provides that a party asserting a claim to a federal court may join "as many claims . . . as the party has against an opposing party." Also, pursuant to 28 U.S.C. § 1331, federal courts have pendent jurisdiction over state law claims where a party presents a federal claim. Thus, pursuant to this court's pendent jurisdiction, Plaintiff's petition for review of the Commission's decision was properly joined with his

claims made pursuant to § 1983.

For the reasons stated above, however, the undersigned has found that Count I, Plaintiff's § 1983 claims, are without merit and should be dismissed. The only claim remaining is Plaintiff's claim, in Count II, for administrative review pursuant to a state statute. When all federal claims are dismissed, a federal court has discretion to retain jurisdiction over claims for which a party could not have independently sought redress in federal court. See American Civil Liberties Union v. City of Florissant, 186 F.3d 1095, 1098 (8th Cir. 1999) (American Civil Liberties Union); Graning v. Sherburne County, 172 F.3d 611, 617 (8th Cir. 1999). Under such circumstances, a federal court ordinarily dismisses the state claims "without prejudice to avoid '[n]eedless decisions of state law. . . as a matter of comity.'" American Civil Liberties Union, 186 F.3d at 1098 (citations omitted). Because the Missouri Administrative Procedure Act specifically provides for judicial review of the Commission's decision, the undersigned finds that comity favors having Missouri courts resolve the issues raised by Plaintiff in his claim for administrative review. See Mo. Rev. Stat. § 536.100. Therefore, this court declines to exercise its discretionary jurisdiction in this matter and will dismiss Plaintiff's state law claim without prejudice. American Civil Liberties Union, 186 F.3d at 1098 (citations omitted).

CONCLUSION

For the reasons stated above, the undersigned finds that Defendants are entitled to summary judgment on Plaintiff's Fourth Amendment claim. The undersigned further finds that because Plaintiff's complaint fails to state a claim for a violation of due process under the Fourteenth Amendment, Count I should be dismissed in

its entirety. The undersigned declines to exercise discretionary jurisdiction over Plaintiff's claim in Count II, for administrative review.

Accordingly,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (Doc. 10) and Defendants' Motion to Dismiss (Doc. 9) are GRANTED;

IT IS FURTHER ORDERED that Plaintiff's complaint (Doc. 1) is DISMISSED

Dated this 13th day of November, 2001.

Jean C. Hamilton
United States District Judge

Footnotes

fn1 Unless otherwise stated, the facts as discussed above are uncontroverted.

fn 2 Plaintiff does not deny Defendants' assertion that he was afforded a pre-termination hearing. Defendants' Exhibit D is a notification of the hearing, which states that Plaintiff will have the opportunity to explain the test results and which affords him the opportunity to have a representative present.

fn3 Rule 120 provides that, where observation is required of an employee providing a specimen, only testing facility personnel may observe, and that the sample must be split, so that the employee can request, within 72 hours, that the split specimen be tested by another laboratory. See Pl.'s Reply, Doc. 10, Ex. 2 at XII. Rule 120 further provides that when results are positive,

a medical review officer notify the employee. See id.

fn4 Plaintiff seeks relief under 42 U.S.C. § 1983 for the allegations of Count I. To establish a claim against Defendants, Plaintiff must establish that he was deprived of a constitutional right, privilege, or immunity, and that Defendants acted under color of state law. See Graning v. Sherburne County, 172 F.3d 611, 615 (8th Cir. 1999) (citing Reeve v. Oliver, 41 F.3d 381, 383 (8th Cir. 1994)). There is no issue in this matter regarding Defendants acting under color of state law.

Fn5 The Eighth Circuit has held:

> First, urinalysis can be required where the testing is carried out under a specific plan and is applied either randomly or routinely to Government employees,. (citations omitted). Second, regardless of whether any drug testing plan is in place, a Government employer may require an employee to submit to urinalysis where the employer has reasonable, articulable grounds to suspect an employee of illegal drug involvement. The second standard requires individualized suspicion, specifically directed to the person who is targeted for the urinalysis test. (citations omitted).

Ford v. Dowd, 931 F.2d 1286, 1289 (8th Cir. 1991).

fn6 At Plaintiff's hearing before the Civil Service Commission of the City of St. Louis, Karen West, Human Resource Specialist and Drug and Alcohol Program Administrator for the City, testified that the City has pools of employees from which it selects employees for

drug testing. See Def.'s Mem., Doc. 10, Ex. G at 174. She further testified that correctional officers are included in a public safety pool. See id. West said that each member of a work group is entered into the pool, with a number assigned to that group. See id. at 176. West explained that each month the computer pulls numbers assigned to a group, so that on a given month she might get a list that says that individuals who work on a particular shift, on a given day, in a particular group, will be tested. See id. at 177. West said that when a name and social security number are first put into a pool, each name is assigned a number; however, after the number is assigned, "the name and social security number are stripped away." Id. At 178. West testified that this process, by which the City's corrections officers are chosen for drug testing, is random. See id. at 181.

Also, Rule 120 provides for "reasonable suspicion testing" and "random testing," and sets forth procedures for both. See Pl.'s Reply, Doc. 10, Ex. 2.

fn7 Rule 120 provides that "[e]mployees will not be observed when providing a urine sample unless there is evidence. . . that the employee has attempted to alter the sample or has previously been observed for attempting to interfere with the testing process." Because Plaintiff contends that an employee of the testing entity observed him, the facts do suggest that Plaintiff was, in fact, "singled out."

fn8 The Eighth Circuit has held that "employment rights are not 'fundamental' rights created by the Constitution." Singleton v. Cecil, 176 F.3d 419 427 (8th Cir. 1999) (Singleton) cert. denied, 528 U.S. 966(1999). The court further held that "a public employee's interest in continued employment with a governmental employer is not 'so fundamental' as to be protected by substantive

due process." Id. (citing Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 1995-99 (1999). In other words. "[t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions."' Id. (citing Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992)). The Eighth Circuit has concluded that the Supreme Court "has neither held nor intimated that [an] employee's occupational liberty is entitled to substantive due process protection." Id. Therefore, "'any cause of action for the deprivation of occupational liberty [is] confined to a claim under procedural due process; there is no cause of action under substantive due process." Id. (citing Zorzi v. County of Putnam, 30 F3d 885,895(7th Cir. 1994)). The Eighth Circuit further has held that to hold otherwise would require that "every time a [governmental employee] [was] affected by governmental action, [the employee] would have a federal right to judicial review." Id. at 428 (citations omitted).

fn9 Plaintiff does not assert that his specimen was not split, that he requested the split specimen be tested by an independent laboratory, or that independent testing proved that the test conducted under the auspices of the City was a false positive. See Pl.'s Reply, Doc. 10, Ex. 6 at XII.

fn10 The Eighth Circuit Court of Appeals unequivocally has held that a plaintiff must exhaust state remedies prior to asserting a claim for denial of procedural due process. See Wax 'n Works v. City of St. Paul, 213 F3d 1016, 1019 (8th Cir. 2000) (Wax 'n Works); Stephenson v. Davenport Community School Dist., 110 F.3d 1301, 1312 (8th Cir. 1997) (citations omitted). Where a plaintiff has failed to exhaust state remedies, a federal court need not address a claim that the plaintiff was denied

procedural due process. See id. Moreover, failure to seek judicial review by a state appellate court, where such review is authorized by statute, constitutes a failure to exhaust state remedies. See Wax 'n Works., 213 F.3d at 1020. "[E]xhaustion of state remedies is necessary before any federal procedural due process allegations state a claim under § 1983." Id.

fn11 Plaintiff does not suggest that he was denied the opportunity to obtain alternate testing of a split sample, as provided by Regulation 120.

No. 02-1114

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Eugene Booker,
Appellant,

vs.

City of St. Louis, et al., Appellees.

January 14, 2003, Decided

OPINION:

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 14, 2003

TITLE 49 - TRANSPORTATION

Subtitle A - Office of the Secretary of Transportation

PART 40 - PROCEDURES FOR TRANSPORTATION WORKPLACE **DRUG TESTING** PROGRAMS

Subpart B - **Drug Testing**

Sec. 40.23 Preparation for **testing**.

* * *

(d) Written procedures, instructions and training shall be provided as follows:

(1) Employer collection procedures and training shall clearly emphasize that the collection site person is responsible for maintaining the integrity of the specimen collection and transfer process, carefully ensuring the modesty and privacy of the donor, and is to avoid any conduct or remarks that might be construed as accusatorial or otherwise offensive or inappropriate.

* * *

(4) In any case where a collection is monitored by non-medical personnel or is directly observed, the collection site person shall be of the same gender as the donor. A collection is monitored for this purpose if the enclosure provides less than complete privacy for the donor (e.g., if a restroom stall is used and the collection site person remains in the restroom, or if the collection site person is expected to listen for use

of unsecured sources of water).

[54 FR 49866, Dec. 1, 1989, as amended at 60 FR 19536, Apr. 19, 1995]

Sec. 40.25 Specimen collection procedures.

(b) Security. The purpose of this paragraph is to prevent unauthorized access which could compromise the integrity of the collection process or the specimen.

(1) Procedures shall provide for the designated collection site to be secure. If a collection site facility is dedicated solely to urine collection, it shall be secure at all times. If a facility cannot be dedicated solely to **drug testing**, the portion of the facility used for **testing** shall be secured during **drug testing**.

(2) A facility normally used for other purposes, such as a public rest room or hospital examining room, may be secured by visual inspection to ensure other persons are not present and undetected access (e.g., through a rear door not in the view of the collection site person) is not possible. Security during collection may be maintained by effective restriction of access to collection materials and specimens. In the case of a public rest room, the facility must be posted against access during the entire collection procedure to avoid embarrassment to the employee or distraction of the collection site person.

* * *

[54 FR 49866, Dec. 1, 1989, as amended at 59 FR 7355, Feb. 15, 1994; 59 FR 43000, Aug. 19, 1994; 61 FR 37699, July 19, 1996]

U.S. Constitution: Fourth Amendment

Fourth Amendment - Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution: Fourteenth Amendment

Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such

State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

Supreme Court, U.S.
FILED
JUN 13 2003
OFFICE OF THE CLERK

No. 02-1511

IN THE

Supreme Court of the United States

EUGENE BOOKER,
Petitioner,

v.

CITY OF ST. LOUIS, A MUNICIPAL CORPORATION;
NINA MURPHY, CHAIRPERSON OF THE CIVIL SERVICE COMMISSION OF THE CITY OF ST. LOUIS, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES;
JOHN H. CLARK, VICE-CHAIRPERSON OF THE CIVIL SERVICE COMMISSION OF THE CITY OF ST. LOUIS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES;
KAY V. LEONARD, MEMBER OF THE CIVIL SERVICE COMMISSION OF THE CITY OF ST. LOUIS, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

I. Respondent Objects to Consideration of the Sole Question Presented Herein, Inasmuch As the Issue Was Not Timely Raised in the Proceedings Below.

The sole question presented by the Petition is whether the Fourth Amendment prohibits "opposite sex direct monitoring and observation of public employees while providing urine samples for drug testing" (Petitioner's Brief, page i). Petitioner argues that both the District Court and the United States Court of Appeals for the Eighth Circuit have improperly held that such opposite sex monitoring is constitutional.

Respondents City of St. Louis, Nina Murphy, John H. Clark and Kay V. Leonard, members of the City's Civil Service Commission, object to the consideration of this question by this Court in that it was not timely raised in the proceedings below. (Hereinafter, the term "Respondent" or "Respondent City of St. Louis" shall for convenience be used to signify all Respondents).

Petitioner was dismissed from his employment as a correctional officer with Respondent City of St. Louis when, after random drug testing, it was found that Petitioner's urine tested positive for illegal drugs. Petitioner then appealed his dismissal to the Civil Service Commission of the City of St. Louis, where he was represented by counsel and testified on his own behalf. At that administrative hearing, Petitioner did not raise as an issue the constitutionality of opposite-sex monitoring and, accordingly, Respondent offered no testimony as to the circumstances which gave rise to the opposite-sex monitoring.

Petitioner then filed an action in the United States

District Court for the Eastern District of Missouri pursuant to 42 U.S.C. 1983. Again, the constitutionality of opposite-sex monitoring was not raised as an issue, as evidenced by the lack of any reference thereto in Plaintiff's Complaint. (J.A. at 7-20).

In fact, the first time Plaintiff indicates any concern whatsoever about opposite-sex monitoring is in the Affidavit of Eugene Booker (J.A. 86-88), included within Plaintiff's Proof in Opposition to Defendants' Motion for Summary Judgment. Although Respondent maintained that the issue of the constitutionality of opposite-sex monitoring had not been timely raised and, therefore, should not be considered by the District Court, the Court nevertheless proceeded to consider the issue and to rule in Respondent's favor with respect thereto.

Similarly, when Petitioner appealed the decision of the District Court to the United States Court of Appeals for the Eighth Circuit, Respondent again argued that the issue of the constitutionality of opposite-sex monitoring had not been timely raised and should not be considered. The Eighth Circuit also, however, decided to consider the issue and, like the District Court, ruled in Respondent's favor on that question, as well as all others.

A party may not create an issue of fact by filing an affidavit, after a motion for summary judgment has been made, which contradicts prior discovery and deposition responses. *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986); *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2nd Cir. 1969).

For this reason, as well as the reasons set forth herein, Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

II. The Question Presented Is of Little Significance In That: 1) It Is an Isolated Occurrence as Evidenced by the Fact That Respondent's Policy Now Expressly Calls for Same-Sex Monitoring on Those Occasions When Observation Is Necessary during Drug Testing, and 2) the Paucity of Case Law on This Issue Among the Circuits Indicates That It Is an Issue Which Rarely Arises and 3) It Is Fact-Specific in That Petitioner Was an Employee in a Correctional Institution and, Therefore, Had a Diminished Expectation of Privacy and In That Petitioner Had His Back Turned to the Monitor.

1) Isolated Occurrence. If the Court were to grant certiorari in this matter, it would be doing no more than reviewing the facts with respect to an individual Petitioner's drug testing procedure. The case is so fact-specific that it is unlikely to be duplicated elsewhere and, more importantly, will have no general impact, nor even a localized impact upon Respondent City of St. Louis.

It is highly unlikely that a determination by the Court in this case would have any general impact. As Petitioner points out, this appears to be the first instance in which a federal court of appeals has ruled on the permissibility of opposite-sex monitoring in the context of drug testing public employees. There is no conflict among the federal circuit courts with respect to this issue. In fact, there is no case law precisely on point.

Presumably, this is because the issue rarely arises. This is not surprising since it is difficult to imagine an employer insensitive or foolhardy enough to establish a

policy or custom requiring, or even a practice of regularly permitting, opposite-sex monitoring for drug testing by urinalysis. This is not an issue which presently commands the attention of courts, employers and employees to any significant degree.

Additionally, a decision by this Court would have no impact on Respondent City of St. Louis because, first, Respondent did not conduct its own drug testing but, rather, contracted with an outside firm, BJC Health Services ("BJC") to handle all matters pertaining to drug testing. BJC, in turn, engaged a subcontractor ("subcontractor") to do the actual collection of urine specimens of Respondent's employees. (Petitioner's Brief, page 2a). Thus, it was not Respondent, itself, who permitted opposite-sex observation in this case, but BJC's subcontractor.

The record is devoid of explanation as to how or why, or even if, the subcontractor engaged in opposite-sex observation in this case. This is because Petitioner neglected to raise the issue of opposite-sex observation at his hearing before the Civil Service Commission and, in fact, did not see fit to raise the issue until he filed his Suggestions in Opposition to Summary Judgment in the District Court.

Further, although the matter of the monitor's gender was not addressed in Respondent's written drug testing policy as it existed at the time of Petitioner's drug testing, Respondent's current policy expressly calls for same-sex monitoring in those cases where monitoring may be warranted.[1] It is clear, therefore, both that

---

[1] Department of Personnel Administrative Regulation 120, effective October 1, 2001, states: "When a directly observed collection is required, the observer will be an employee of the collection service, who is of the same gender as the employee."

Respondent's policy requires no revisions and that a decision by this Court would have no impact on Respondent's policies or procedures in this regard.

2) No Need for Decision. There is no conflict among the federal circuit courts with respect to the issue of same-sex monitoring during collections of urine specimens from public employees. In fact, there are virtually no other reported cases on this issue. Thus, it appears that this is not a question of serious concern for employers or employees throughout the country, nor one that the United States Supreme Court needs to resolve. Respondent would suggest, in fact, that most employers who engage in urinalysis testing of employees already use same-sex monitoring when observation is warranted and there is no body of law to indicate that district or appellate courts would rule in a manner that would need this Court's clarification or guidance.

The general understanding among employers that same-sex monitoring is preferable to opposite-sex observation is undoubtedly the reason why, as Petitioner points out, this is the first case in which a federal court has made a determination with respect to opposite-sex urinalysis observation. The issue simply does not arise with any frequency.

Even in the City of St. Louis, this instance of opposite-sex observation appears to be an isolated occurrence, inasmuch as Petitioner has never accused Respondent of engaging in a pattern or practice of opposite-sex monitoring.

It is well-settled that an isolated occurrence is not sufficient to state a cause of action against a municipality pursuant to 42 U.S.C. 1983. *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct.2427, 85 L.Ed. 2d 791 (1985). Thus, even if certiorari were granted in this

matter, the Court's consideration would not likely go beyond the threshold issue of "isolated occurrence" and would not, therefore, have any impact whatsoever.

Again, Respondent would ask the Court to note that it was not Respondent, itself, that engaged in, or authorized, the opposite-sex observation. Rather, it was the subcontractor of BJC, the company with whom Respondent contracted, that was responsible for supplying the monitor in this instance. Inasmuch as neither BJC, nor its subcontractor, was named as a party-defendant in the court below, and inasmuch as Respondent's current policy already requires same-sex monitoring, a decision by this Court would effect only minimal change, if any.

3) Fact-Specific / Diminished Expectation of Privacy. The facts of this specific case are that Petitioner was employed by Respondent at one of its correctional facilities at the time he was randomly selected for drug testing. The urine specimen collection took place on the premises of the correctional facility in what amounted to a locker room with toilet stalls. Other persons were entering and exiting the locker room during the collection process.

As the courts below have noted – and contrary to Petitioner's contention – both employees and inmates of correctional facilities have diminished expectations of privacy. *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 567 (8th Cir. 1988); *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990), *cert. denied* 501 U.S. 1209, 115 L.Ed.2d 979, 111 S.Ct. 2807 (1991); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988).

Because of this fact-specific situation, any decision this Court might render would be of only limited applicability and utility.

III. Petitioner's Allegation That the Eighth Circuit's Decision Conflicts with the Supreme Court's Analysis and Standards Established in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) Is Inaccurate.

1) *Vernonia* Was Immaterial to the Decision of the Eighth Circuit.

In the first instance, it is clear that the Eighth Circuit did not find it necessary to rely on *Vernonia School District 47 J v. Acton*, 515 U.S. 646 (1995), in order to reach its decision in this matter. The Appellate Court's actual holding is set out on page 6a of Petitioner's Brief, in the copy of the Eighth Circuit's decision appended to said Brief. What the Eighth Circuit specifically held was:

> On appeal, Booker argues that Curia violated the City's regulation concerning privacy in drug testing. Even if she did, a violation of a municipal regulation does not establish a constitutional violation for purposes of §1983. See *Ebmeier v. Stump*, 70 F.3d 1012, 1013 (8th Cir. 1995). In addition, the City could not be held vicariously liable for a violation of its regulation. See *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999).

The Eight Circuit's reference to *Vernonia,* immediately follows the above quote at page 7a of Petitioner's Brief and is clearly an alternative theory, set out in addition to its primary holding:

> In any event, even assuming, as Booker alleges, that Curia stood a foot behind him as he provided the sample in a bathroom stall located in the restroom of a locker room in the correctional facility, we do not believe the manner of collection was

> so intrusive as to constitute an unreasonable search. In *Vernonia Sch. Dist.*, 515 U.S. at 657, the Supreme Court....

Thus, this Court need not consider whether the Eighth Circuit correctly applied the *Vernonia* analysis, inasmuch as *Vernonia* was not necessary to the determination of the court below since the Appellate Court had already determined that a violation of a municipal regulation did not amount to a constitutional violation, and that , moreover, there could be no vicarious liability.

2. The Eighth Circuit's Decision Does Not Conflict with This Court's Analysis and the Standards Set Out in *Vernonia*.

By Petitioner's own analysis, Petitioner's Brief, page 3, *Vernonia* considered three factors in judging the constitutionality of governmental drug testing:

> ...(1) the nature of the privacy interest upon which the search intrudes; *Id.* at 654 (2) the character of the intrusion that is complained of; *Id.* at 658 and (3) "the nature and immediacy of the government's concern at issue and the efficacy of the means employed for meeting" that concern. *Id.* at 660.

The Eighth Circuit dutifully applied this three-factor analysis to the instant case.

With respect to the nature of the privacy interest upon which the search intrudes, the Eighth Circuit recognized this Court's acknowledgment of the privacy interest in the excretory function of giving urine. It also noted, however, that certain categories of individuals have a diminished expectation of privacy, referencing a line of cases holding that opposite sex observation of inmates by prison guards is acceptable in certain cir

cumstances. *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990) *cert. denied*, 501 U.S. 1209, 115 L.Ed. 2d 979, 111 S.Ct. 2807 (1991); *Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988).

In fact, the Eighth Circuit decision, Petitioner's Brief, page 6a, states that Petitioner also concedes that "...as a correctional officer in a medium security institution, he had a diminished expectation of privacy." This is in harmony with the holding in *Vernonia that:*

> Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. See *Skinner,* 489 U.S. at 627; *United States v. Biswell,* 406 U.S. 311, 316, 32 L.Ed.2d 87, 92 S.Ct. 1593 (1972).

Nor is the Eighth Circuit's analysis of the character of the intrusion complained of at odds with this Court's holding in *Vernonia.* Both decisions recognize that the giving of urine is a function ordinarily shielded by privacy. Again, both decisions hold that the degree of intrusion is determined by the manner in which the giving of the urine sample is monitored.

At various points in his argument, Petitioner infers that he should not have been monitored at all. Respondent suggests that this should not be a issue for consideration here, since the only question presented for review is whether the Fourth Amendment prohibits opposite-sex monitoring of public employees while providing urine samples for drug testing. Therefore, Petitioner has effectively conceded the propriety of monitoring for purposes of this Petition for Certiorari.

With regard to the issue of opposite-sex monitoring of

urine production for drug testing, Petitioner cites no law expressly prohibiting same. Respondent City agrees that same-sex monitoring is preferable – and, indeed, Respondent's policy calls for same-sex monitoring. Respondent, however, would suggest that there may be circumstances under which same-sex monitoring is not possible or practicable. Unfortunately, there is no testimony on this issue included in the record of Petitioner's appeal to the City's Civil Service Commission because Petitioner did not raise the issue of the constitutionality of opposite-sex monitoring until he filed his Brief in Opposition to Summary Judgment in the District Court.

In the absence of any express prohibition on opposite-sex monitoring, the sex of the monitor becomes merely another factor in ascertaining the degree of the intrusion on Petitioner's privacy.

In this case, the Eighth Circuit accepted Petitioner's claim that he was required to urinate in a bathroom stall, and that a monitor of the opposite sex stood a foot behind him (Petitioner's Brief, page 6) "so that she could observe his genitals as he provided his urine sample." (Petitioner's Brief, page 7). Respondent notes that, even in Petitioner's version of the situation, the only allegation is that the monitor "could" have observed his genitals – not that she did, in fact, observe them. In fact, it is clear that Petitioner's back was turned, thus providing a shield.

In any event, the Eighth Circuit apparently determined that the factual scenario presented by Petitioner represented only a negligible intrusion on Petitioner's privacy, citing both *Vernonia, Id.* at 657 and *Wilcher v. City of Wilmington,* 139 F.3d 366 (3d Cir. 1998) as support. In both cases, as in the instant case, urine production for drug testing was monitored, with the

monitors standing behind the fully-clothed individuals providing the samples.

Finally, with regard to the nature and immediacy of the government's concern and the efficacy of the means employed to meet that concern, Petitioner has already conceded the gravity of Respondent's concern. As set out in the Eighth Circuit's decision (Petitioner's Brief, page 6a):

Booker also concedes that the City has a compelling interest "in assuring that the activities of employees who come into daily contact with inmates are not [hindered] by drugs and are fully capable of performing their duties"....

Thus, there is no need for a determination by this Court with respect to a compelling governmental interest.

With regard to the "efficacy" of the means used to achieve the City's goals, there may or may not be less intrusive methods of meeting the City's concerns. Nevertheless, this Court held in *Vernonia*, *Id.* at 663, that "[W]e have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment."

Respondent would submit, therefore, that the decision of the Eighth Circuit does not run *contra* to this Court's holding in *Vernonia*.

CONCLUSION

For all the foregoing reasons, and particularly because of the extremely limited impact any decision by this Court would have, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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